

CPLR 4102: Validity of Jury Waiver Clause in Lease Upheld in Action Sounding in Contract

St. John's Law Review

Follow this and additional works at: <https://scholarship.law.stjohns.edu/lawreview>

Recommended Citation

St. John's Law Review (1973) "CPLR 4102: Validity of Jury Waiver Clause in Lease Upheld in Action Sounding in Contract," *St. John's Law Review*: Vol. 47 : No. 4 , Article 21.

Available at: <https://scholarship.law.stjohns.edu/lawreview/vol47/iss4/21>

This Recent Development in New York Law is brought to you for free and open access by the Journals at St. John's Law Scholarship Repository. It has been accepted for inclusion in St. John's Law Review by an authorized editor of St. John's Law Scholarship Repository. For more information, please contact lasalar@stjohns.edu.

Appellate Division, Second Department,¹³⁶ which states in part that a general preference may be obtained provided "[t]hat the venue of the action was properly laid in the county in which it is pending, within the requirements of the CPLR. . . ."¹³⁷ In so holding, the court found that the plaintiffs' choice of venue, Westchester County, was improper under CPLR 503(a) unless the action was jurisdictionally required to be tried there,¹³⁸ since Westchester was not the county where one of the parties resided at the time of the commencement of the action. The court further noted that this finding was not impeded by the defendants' failure to oppose the motion or the failure by any of the parties to request a change in venue.¹³⁹

This decision implements the court's inherent power to control its calendar,¹⁴⁰ the cited appellate division rule, and the inconvenient forum policy.¹⁴¹ "[W]here, as here, one or more of the parties reside in a county in the State the venue preference requirement is singularly applicable and the preference must be sought in the county in which one of the parties resides."¹⁴²

ARTICLE 41 — TRIAL BY A JURY

CPLR 4102: Validity of jury waiver clause in lease upheld in action sounding in contract.

Prior to the 1965 enactment of section 259-c of the Real Property Law, courts frequently upheld lease provisions in which the right to a jury trial was waived by the contracting parties.¹⁴³ Section 259-c limits the efficacy of such clauses by invalidating a jury trial waiver "in any action for personal injury or property damage."¹⁴⁴ Recently, however, in *Lindenwood Realty Co. v. Feldman*,¹⁴⁵ the Appellate Division,

¹³⁶ 22 NYCRR 674.1(a) (actions for damages for permanent disability or death).

¹³⁷ 72 Misc. 2d at 380, 339 N.Y.S.2d at 400.

¹³⁸ *Id.* at 379, 339 N.Y.S.2d at 399.

¹³⁹ *Id.*, 339 N.Y.S.2d at 398-99, citing *Carbide & Carbon Chems. Co. v. Northwest Exterm. Co.*, 207 Misc. 548, 139 N.Y.S.2d 480 (Sup. Ct. Queens County 1955).

¹⁴⁰ See 4 WK&M ¶ 3403.02.

¹⁴¹ See *Asaro v. Audio by Zimet, Inc.*, 69 Misc. 2d 316, 330 N.Y.S.2d 25 (Dist. Ct. Suffolk County 1972) (mem.), discussed in *The Quarterly Survey*, 47 ST. JOHN'S L. REV. 148, 161 (1972); *Suriano v. Hosie*, 59 Misc. 2d 973, 302 N.Y.S.2d 215 (Dist. Ct. Nassau County 1969), discussed in *The Quarterly Survey*, 44 ST. JOHN'S L. REV. 532, 588 (1970).

¹⁴² 72 Misc. 2d at 380, 339 N.Y.S.2d at 399.

¹⁴³ Lease waiver provisions have been strictly construed, however, and limited to actions seeking to enforce rights originating under the lease. See 14 CARMODY-WAIT 2d, § 90:262, at 211 (1967); 4 WK&M ¶ 4102.14. See generally 3 J. RASCH, LANDLORD AND TENANT § 1344 (2d ed. 1971).

¹⁴⁴ N.Y. REAL PROP. LAW § 259-c (McKinney 1968).

¹⁴⁵ 40 App. Div. 2d 855, 338 N.Y.S.2d 245 (2d Dep't 1972), *rev'g mem.* 72 Misc. 2d 68, 338 N.Y.S.2d 243 (App. T. 2d Dep't 1971).

Second Department, strictly construed section 259-c to uphold the validity of a broad jury waiver provision in a lease.

Therein, a landlord sued its tenants to recover for rent and property damage to the leased premises. The appellate term held that section 259-c precluded the landlord from invoking a jury waiver provision in the lease to negate the tenants' demand for a jury trial. The dissent, however, maintained that the words "personal injury or property damage" within the section "traditionally . . . refer to tort actions arising out of a liability imposed by law for negligence, or even a willful tort, but not out of a contract."¹⁴⁶ This and its view of section 259-c as "a companion section to"¹⁴⁷ section 5-321 of the General Obligations Law,¹⁴⁸ which invalidates an agreement exempting a lessor from liability for "injuries to person or property" caused by his negligence, led the dissent to conclude that the waiver provision in this instance was valid.

When the Second Department reversed the appellate term in a memorandum decision, it adopted the reasoning of the dissent in the lower court.¹⁴⁹

CPLR 4110: Two-year delay in challenging impartiality of jurors, while awaiting review of favorable verdict, will preclude assertion of such claim.

Since parties to a civil action are entitled to have their case presented before an impartial jury, CPLR 4110 enumerates various grounds for challenging a prospective juror for cause.¹⁵⁰ If, after the verdict, it becomes apparent that circumstances existed which would have been grounds for exclusion of a juror before trial, a court may set the verdict aside.¹⁵¹ Once his particular interest is demonstrated, whether the juror would decide the case objectively becomes a question of fact for the court provided that a prima facie disqualification does not exist.¹⁵²

¹⁴⁶ 72 Misc. 2d at 69, 338 N.Y.S.2d at 244 (Gulotta, J., dissenting).

¹⁴⁷ *Id.* at 70, 338 N.Y.S.2d at 244.

¹⁴⁸ N.Y. GEN. OBLIG. LAW § 5-321 (McKinney 1964).

¹⁴⁹ *But see* Swinger Realty Corp. v. A.S. Kizner Imports, Inc., 70 Misc. 2d 742, 335 N.Y.S.2d 108 (App. T. 1st Dep't 1972) (per curiam); 4 WK&M ¶ 4102.14.

¹⁵⁰ CPLR 4110 does not exclude common-law grounds for such a challenge. *See* 7B MCKINNEY'S CPLR 4110, commentary at 138 (1963); 4 WK&M ¶ 4110.07.

¹⁵¹ Knickerbocker v. Erie R.R., 247 App. Div. 495, 286 N.Y.S. 1001 (4th Dep't 1936) (per curiam).

¹⁵² *See* 4 WK&M ¶¶ 4110.02, 4110.09. CPLR 4110(b) provides that a relationship "within the sixth degree by consanguinity or affinity to a party" automatically disqualifies a juror.